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No. 95-2074

In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF BOERNE, TEXAS, PETITIONER

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993 violates principles of federalism, the separation of powers, or the Establishment Clause, and, if not, whether *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), should be reconsidered.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 73 F.3d 1352. The opinion of the district court (Pet. App. 24a-29a) is reported at 877 F. Supp. 355.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. A petition for rehearing was denied on March 28, 1996. Pet. App. 30a-31a. The petition for a writ of certiorari was filed on June 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, establishes, as a matter of statutory right, heightened protection for the exercise of religion.[1] Central to RFRA is the requirement that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. Under the Act, the "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

RFRA's mandate applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise," adopted either before or after RFRA. 42 U.S.C. 2000bb-3(a). RFRA identifies the "government[s]" subject to its terms as any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or subdivision of a State." 42 U.S.C. 2000bb-2(1). A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c).

The legislative history indicates that, in passing the legislation, Congress relied upon its authority under Section 5 of the Fourteenth Amendment and

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[1] The text of RFRA is reproduced at Pet. App. 39a-42a.

the Necessary and Proper Clause, Art. I, § 8, Cl. 18. S. Rep. No. 111, 103d Cong., 1st Sess. 13-14 (1993).

b. Congress enacted RFRA following this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not require Oregon to exempt from its general criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id.* at 877-882. Under *Smith*, such generally applicable laws may be applied to religious exercises even when not supported by a compelling government interest. *Id.* at 884-889.

In enacting RFRA, Congress expressed concern about the impact of the *Smith* decision on the exercise of religion. After holding hearings and collecting evidence,[2] Congress concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. 2000bb(a)(2). The compelling interest test used by courts prior to *Smith*, Congress concluded, "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). Accordingly, Congress enacted RFRA for the purpose of restoring, as a matter of

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[2] See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990).

statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1).

c. Prior to RFRA's passage, Congress specifically considered the question of its constitutional authority to enact the legislation. The House Report stated that, under Section 5 of the Fourteenth Amendment, Congress

> has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself.

H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 & n.21 (1993) (citing cases). The House Report concluded that, "in passing [RFRA], Congress appropriately creates a statutory right within the perimeter of its power." *Ibid.* The Senate Report echoed the House Report's view. Because RFRA "is clearly designed to implement the free exercise clause—to protect religious liberty and to eliminate laws 'prohibiting the free exercise' of religion," the Senate Report concluded, "[RFRA] falls squarely within Congress' section 5 enforcement power." S. Rep. No. 111, *supra*, at 14.

In enacting RFRA, Congress repeatedly disavowed any effort to review or reverse this Court's decision in *Smith* or in any other case. S. Rep. No. 111, *supra*, at 9, 14 n.43 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action."); H.R. Rep. No. 88, *supra*, at 7,

15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde). Congress stated that it was creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope. S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 9, 15 n.3.

2. a. P.F. Flores is the Archbishop of San Antonio, Texas. Saint Peter Catholic Church in Boerne, Texas, is within the San Antonio Archdiocese. Because of substantial population growth, the Church is no longer able to accommodate all of its parishioners who seek to attend its regular services. According to the complaint, the Church will be unable to accomplish its mission or survive as a parish church unless it expands. In 1990, Archbishop Flores authorized enlargement of the Church to accommodate all those seeking to worship there and to conform the sanctuary's layout to current liturgical requirements of the Catholic Church. Pet. App. 2a.

The City subsequently designated a Historic District in Boerne that includes a portion of the Church. (The Church itself is not a historic landmark.) In 1994, the City denied Archbishop Flores' application for a permit to expand the Church, because of its location within the Historic District. Pet. App. 2a.

b. Archbishop Flores filed suit challenging the City's denial of the construction permit. Archbishop Flores alleged that the City's action violated RFRA. The complaint also includes claims under the First, Fifth, and Fourteenth Amendments to the federal Constitution and under the Texas Constitution.[3] The

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[3] Adjudication of these other claims has been stayed by the district court pending the outcome of the Fifth Circuit litigation.

City defended in part on the ground that RFRA is unconstitutional. Pet. App. 2a-3a. The United States then intervened for the limited purpose of defending the constitutionality of RFRA. *Id.* at 26a.

The district court subsequently issued an order declaring RFRA unconstitutional on separation of powers grounds. Specifically, the district court ruled that, through RFRA, Congress usurped the Supreme Court's exclusive authority to interpret the Constitution by attempting to overturn this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, *supra*. The district court also questioned Congress's authority to enact RFRA under Section 5 of the Fourteenth Amendment. The district court did not address the underlying merits of Archbishop Flores' RFRA claim. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b) and stayed all further proceedings pending disposition of the appeal. Pet. App. 26a-29a.

c. Archbishop Flores and the United States filed timely petitions for interlocutory review and notices of appeal. Construing the district court's order as a certification under Federal Rule of Civil Procedure 54(b), the Fifth Circuit granted permission to appeal. On January 23, 1996, the Fifth Circuit issued a decision reversing the district court and upholding the constitutionality of RFRA. Pet. App. 1a-23a. The Fifth Circuit concluded that, in enacting RFRA, Congress properly exercised its power under Section 5 of the Fourteenth Amendment. The court rejected the City's attempt to confine Congress's Section 5 power to measures that enforce only the Fourteenth Amendment's Equal Protection Clause. *Id.* at 10a-11a. The court of appeals then concluded that RFRA is plainly

adapted to enforcing the Fourteenth Amendment's free exercise and equal protection guarantees because RFRA (i) deters governmental violations of the free exercise clause, (ii) limits laws that have the effect of impeding religious exercise, and (iii) protects and equalizes the free exercise rights of minority religions. *Id.* at 12a-15a.

The court of appeals also rejected the City's facial separation of powers, Tenth Amendment, and Establishment Clause challenges to RFRA. The separation of powers argument, the court concluded, "rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it." Pet. App. 17a. With respect to the Tenth Amendment, the court of appeals noted that principles of federalism are attenuated when Congress acts under Section 5. The court further held that "RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation." *Id.* at 22a. Finally, the court rejected the City's facial Establishment Clause challenge, noting that "RFRA no more advances religion than any other legislatively mandated accommodation of the exercise of religion." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals upholding the constitutionality of the Religious Freedom Restoration Act of 1993 is consistent with the ruling of every other appellate court, and virtually every trial court, that has considered the issue. The court of appeals' decision, moreover, is correct and does not conflict with any decision of this Court. Further review is therefore not warranted.

1. Every appellate court that has considered the issue has upheld the constitutionality of RFRA. *Sasnett* v. *Sullivan*, No. 95-3924, 1996 WL 432348 (7th Cir. Aug. 2, 1996) (RFRA properly enacted under Section 5; separation of powers, Tenth Amendment, and Establishment Clause challenges rejected); *EEOC* v. *Catholic Univ. of America*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) (upholding RFRA as applied to the federal government against separation of powers and Establishment Clause challenges); *South Jersey Catholic Sch. Teachers Ass'n* v. *St. Teresa of the Infant Jesus Church Elementary Sch.*, 675 A.2d 1155, 1166-1167 (N.J. Super. Ct. App. Div. 1996) (upholding Congress's power to enact RFRA under Section 5 of the Fourteenth Amendment and rejecting separation of powers challenges); *Wisconsin* v. *Miller*, 538 N.W.2d 573, 577 (Wis. Ct. App. 1995) (acknowledging Congress's power to enact RFRA under Section 5 and rejecting separation of powers and Tenth Amendment objections to the Act), aff'd, 549 N.W.2d 235 (Wis. 1996). See also *United States* v. *Bauer*, 84 F.3d 1549, 1558-1559 (9th Cir. 1996) (in RFRA case, acknowledging Congress's power and prior practice of protecting "the great guarantees of the Bill of Rights," including First Amendment rights); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d 909, 955-956 (Cal. 1996) (Kennard, J., concurring and dissenting), petition for cert. pending, No. 96-31 (filed July 8, 1996); *id.* at 969 (Baxter, J., concurring and dissenting).[4]

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[4] The issue of RFRA's constitutionality has also been briefed in two pending Fourth Circuit cases: *Davis* v. *Angelone*, Nos. 95-8579, 96-6176, and *Brock* v. *Carroll*, No. 95-7081. It is unclear whether the Fourth Circuit will resolve the question

Virtually every district court that has considered the question has also sustained RFRA. *Lindsey* v. *Vaughn*, No. 93-2030 (E.D. Pa. Aug. 15, 1996), slip op. 3-5; *Abordo* v. *Hawaii*, 902 F. Supp. 1220, 1230-1234 (D. Haw. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 229 n.2 (E.D. Pa. 1995) (dicta); *Belgard* v. *Hawaii*, 883 F. Supp. 510, 513-517 (D. Haw. 1995); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *Campos* v. *Coughlin*, 854 F. Supp. 194, 204 n.7 (S.D.N.Y. 1994) (dicta).[5]

2. Review is also inappropriate because the decision below is interlocutory in nature. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture

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of RFRA's constitutionality in either case. Previously, in *Cochran* v. *Morris*, 73 F.3d 1310 (1996) (en banc), the Fourth Circuit entertained briefing and oral argument on RFRA's constitutionality, but ultimately disposed of the case without reaching the issue. *Id.* at 1317 n.3.

[5] The only outstanding decisions declaring RFRA unconstitutional are two trial court decisions that have not yet been subjected to appellate review. *Keeler* v. *Mayor & City Council of Cumberland*, No. S96-167, 1996 WL 311701 (D. Md. June 10, 1996), petition for interlocutory appeal denied, No. 96-565 (4th Cir. July 17, 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), appeal dismissed as moot, No. MT-95-2336 (9th Cir. Bankr. App. Panel May 7, 1996), appeal pending, No. 96-35801 (9th Cir.). In addition, two judges have written separate opinions concluding that RFRA is unconstitutional. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1557-1570 (8th Cir. 1996) (McMillian, J., dissenting); *Smith* v. *Fair Employment & Housing Comm'n*, 913 P.2d at 937-939 (Mosk, J., concurring). Those opinions were not joined by any other judges, and Justice Mosk's concurrence was written without the benefit of briefing or oral argument on the question.

of the litigation) with *United States* v. *Virginia*, 116 S. Ct. 2264, 2272 (1996) (review granted after final judgment). The question of RFRA's constitutionality arose in the district court on a motion to dismiss. The district court certified the issue for interlocutory appeal under 28 U.S.C. 1292(b) and stayed the case pending resolution of the appeal. Both Archbishop Flores and the United States filed petitions for interlocutory appeal. Although the district court had not entered a partial final judgment under Federal Rule of Civil Procedure 54(b), the Fifth Circuit entertained the appeal as a final judgment under Rule 54(b), rather than under Section 1292(b). In its decision reversing the district court, however, the court of appeals remanded the case for further proceedings, which would include adjudication of the merits of the Archbishop's claims and/or resolution of the other constitutional claims presented in the case.

The question of RFRA's constitutionality is thus not yet "ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Either a rejection of the Archbishop's RFRA claim on its merits or a ruling in the Archbishop's favor on one of the other claims presented would make it unnecessary to decide the question of RFRA's constitutionality. See *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

The City fails to demonstrate (see Pet. 10-11 & n.12) that any serious or irreparable harm will ensue from a denial of review. The litigation and judicial resources that will be devoted to trying this case in the district court on the merits do not constitute the type of harm calling for this Court's review. Cf. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. Nor does the fact that States and localities must comply with the law unless it is held to be unconstitutional warrant review. Such compliance is commonplace in a system that presumes the constitutionality of legislation and obliges parties to obey the law unless and until a court invalidates it.

Granting review on this record would, on the other hand, require the Court to address the constitutionality of federal legislation in a wholly abstract context. Review of the Act's constitutionality would be more appropriate in a case where RFRA has been found applicable to particular facts, or where the statute has been invalidated below, so that the constitutional issues can be presented in a crystallized and concrete form.

3. The court of appeals' decision in this case is, moreover, correct and consistent with this Court's precedent. Congress enacted RFRA pursuant to its authority under Section 5 of the Fourteenth Amendment. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 5 is thus a positive grant of legislative power to Congress, in addition to the authority already embodied in Article I. *Ex parte Virginia*, 100 U.S. 339, 345 (1879); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.). This Court has recognized that, with regard to legislation enacted pursuant to

Section 5, "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

When exercising its legislative power under Section 5, Congress may go beyond outlawing conduct that the Fourteenth Amendment itself proscribes. Congress may legislate prophylactically and regulate state conduct that substantially burdens or threatens to impede the exercise and enjoyment of constitutionally protected activity. *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) (Congress may ban voting practices that have a discriminatory effect, even though the Fourteenth and Fifteenth Amendments proscribe only intentional discrimination); *City of Rome* v. *United States*, 446 U.S. 156, 175-178 (1980); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653 (1966) (in enforcing the Fourteenth Amendment, Congress may outlaw literacy tests that have been upheld against constitutional attack).

A statute constitutes "appropriate legislation" to enforce the Fourteenth Amendment if it (i) is "an enactment to enforce" a right guaranteed by the Fourteenth Amendment, (ii) is "plainly adapted to that end," and (iii) does not transgress any other constitutional limitations. *Morgan*, 384 U.S. at 651. The court of appeals below ruled that RFRA is an "enactment to enforce" the right to free exercise of religion guaranteed by the Fourteenth Amendment and is "plainly adapted" to that end. Pet. App. 10a-15a.[6] The City has not sought review of those aspects

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[6] Specifically, the court of appeals found that RFRA promotes the purposes of the Fourteenth Amendment's free

of the court of appeals' decision. The City seeks this Court's review only of the question whether RFRA transgresses other constitutional limitations: in particular, principles of federalism, the separation of powers, and the Establishment Clause. Each of these arguments is foreclosed by precedent.

a. As the court of appeals recognized, this Court has repeatedly rejected Tenth Amendment or "federalism" challenges to legislation enacted pursuant to Congress's Section 5 power.[7] The Civil War Amendments "'were specifically designed as an expansion of federal power and an intrusion on state sovereignty.' * * * By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (quoting *City of Rome*, 446 U.S. at 179); see also *Ex parte Virginia*, 100 U.S. at 346. States have no special

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exercise and equal protection guarantees. RFRA's heightened scrutiny of laws that substantially burden religious exercise reduces governmental interference with religious duties and, by requiring some measure of accommodation for religious needs, lowers barriers to free exercise. RFRA also preserves for religious minorities, who may be unable to obtain legislative exemptions, the same free exercise rights enjoyed by more established religions. Additionally, RFRA ensures that States cannot conceal intentional discrimination against religious groups through the use of facially neutral laws. Pet. App. 10a-15a.

[7] See, e.g., *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) (federalism principles "are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980).

authority to regulate religion or religious exercise; nor does the Constitution grant localities exclusive jurisdiction over zoning matters. Cf. *Oregon* v. *Mitchell*, 400 U.S. 112, 124-131 (1970) (opinion of Black, J.) (Congress may not prescribe the voting age for state and local elections because Article I, Section 2, expressly reserves that power to the States). RFRA implicates only the general reserve of state authority that is fully subject to Congress's Section 5 power. See *Gregory*, 501 U.S. at 468-470; *EEOC* v. *Wyoming*, 460 U.S. 226, 239-242 (1983); *Ex parte Virginia*, 100 U.S. at 346. Accordingly, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." *City of Rome*, 446 U.S. at 179.[8]

Furthermore, because the United States is equally subject to RFRA, there can be no argument that the

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[8] The City's reliance (Pet. 24-25) on *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. *New York* addressed Congress's power to legislate under the Commerce Clause. The decision thus has nothing to do with established principles concerning the general inapplicability of Tenth Amendment objections to Congress's use of its Section 5 powers. Further, RFRA does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176. States have not been conscripted to administer a federal program; they need not undertake or refrain from undertaking any particular regulatory activity. RFRA simply provides that whatever actions are undertaken must be accomplished consistently with federal norms, just as States currently must conduct their affairs within the constraints of Title VII of the Civil Rights Act of 1964. See *EEOC*, 460 U.S. at 236-243 & n.18.

federal government has aggrandized its own power at the expense of the States. Rather, RFRA

> limit[s] the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. * * * [T]his promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

Pointer v. *Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

For these reasons, the City's request (Pet. 27) that this case be held pending disposition of *Printz* v. *United States*, cert. granted, 116 S. Ct. 2521 (1996) (No. 95-1478), should be rejected. *Printz* addresses the relationship between the Commerce Clause power and the Tenth Amendment.

b. The court of appeals' ruling that RFRA does not violate the separation of powers also comports with this Court's precedent. The City's argument that RFRA violates the separation of powers doctrine proceeds from the assumption that Congress, through RFRA, has sought to supplant this Court as the final arbiter of the Constitution's requirements. In fact, Congress expressly disavowed any attempt independently to interpret the First Amendment.[9] As it has repeatedly done in other contexts, Congress bridged the gap between the tolerance for religion that the

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[9] See S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde); see also *Canedy* v. *Boardman*, No. 95-1931, 1996 WL 405430, at *3 (7th Cir. July 19, 1996) ("RFRA does nothing to change the nature of constitutional rights as defined by the courts.").

First Amendment compels, and the protection of religious exercise that Section 5 of the Fourteenth Amendment permits. Congress's prescription of a statutory legal standard for courts to apply in evaluating statutory claims for relief transgresses no constitutional boundary between the legislative and judicial branches. That conclusion is not altered because Congress here chose to enforce the free exercise guarantee by restoring, as a matter of *statutory* right, a standard of governmental scrutiny that this Court has ruled is not *constitutionally* compelled. Title VII of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have the same effect. Compare *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) (opinion of Stewart, J.) (Constitution does not proscribe voting practices that have only a discriminatory effect) with *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) and *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (Voting Rights Act's statutory restoration of discriminatory effects test upheld); compare *Washington* v. *Davis*, 426 U.S. 229 (1976) (discriminatory impact of employment practices not constitutionally proscribed) with *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (statutory imposition of discriminatory impact test upheld).[10]

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[10] At its core, the City's separation of powers argument proceeds from the mistaken assumption that this Court in *Smith* articulated not just a constitutional floor, but also a ceiling on how much government can accommodate religion. But *Smith* expressly acknowledged the role of legislatures in "affirmatively foster[ing]" the free exercise of religion through accommodation. 494 U.S. at 890. That is all RFRA does, and it does so in a manner that treats all religions equally. Cf. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 114 S. Ct.

c. The City's argument (Pet. 19-20) that RFRA runs afoul of the Establishment Clause because it accommodates religious, but not secular, beliefs disregards this Court's precedent. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). RFRA's alleviation of significant or "substantial" governmental interference with religious exercise is a permissible secular purpose. Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Id.* at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.) (tax subsidy invalidated because it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). Exemptions from otherwise generally applicable statutes do not constitute impermissible governmental facilitation of religion, as long as the government neither adds to nor subsidizes the propagation of the religious message. See *Amos*, 483 U.S. at 338 (accommodation statute need not "come packaged with benefits to secular entities").

2481, 2492-2493 (1994) (noting concerns that may be raised by sect-specific accommodations). Furthermore, the fact that, in the course of enacting RFRA, some members of Congress criticized this Court's decision in *Smith* has no bearing on whether the separation of powers doctrine has been violated. See *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984) ("congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate"). A difference in the conclusions reached by this Court, about what the Constitution compels, and by Congress, about what society as a practical matter requires to protect constitutional rights, is precisely what the separation of powers doctrine in general, and Section 5 in particular, envision.

4. The City asks this Court to overrule "in part" *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Any such departure from the doctrine of *stare decisis* "demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). The City offers no such "special justification."

a. The contention (see Pet. 23) that Congress must make specific factual findings before legislating has been repeatedly rejected by this Court both in Section 5 cases and elsewhere. *United States* v. *Lopez*, 115 S. Ct. 1624, 1631 (1995) ("Congress need [not] make particularized findings in order to legislate.") (quoting *Perez* v. *United States*, 402 U.S. 146, 156 (1971)); *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's religious accommodation requirement "was added to the 1972 amendments on the floor of the Senate with little discussion"); *Fullilove*, 448 U.S. at 458-462 (opinion of Burger, C.J.). In any event, ample fact findings underlay Congress's enactment of RFRA. See S. Rep. No. 111, *supra*; H.R. Rep. No. 88, *supra*.[11]

b. The argument (Pet. 21-23) that "state recalcitrance to the constitutional standard" is a necessary

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[11] The City's suggestion that Congress must specifically find that each particular state action covered by a statute burdens constitutional rights before exercising its Section 5 power would apparently require the invalidation of laws such as Title VII (see *Fitzpatrick*, 427 U.S. at 453-456) and the Voting Rights Act, both of which (like RFRA) impose general standards to govern state conduct. Furthermore, the argument that Congress cannot enact flexible and calibrated standards that take into account States' countervailing interests, but must instead flatly prohibit certain state conduct in order to exercise its Section 5 power, stands traditional notions of federalism on their head.

prerequisite for Section 5 legislation equally lacks foundation in this Court's precedent. See *Oregon* v. *Mitchell*, 400 U.S. at 133-134 (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.); *id.* at 216-217 (opinion of Harlan, J.); *id.* at 233-236 (opinion of Brennan, White, & Marshall, JJ.); *id.* at 283-284 (opinion of Stewart & Blackmun, JJ., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite arguments that evidence of illicit use of tests was geographically limited); *City of Rome*, 446 U.S. at 172 (application of voting preclearance requirements upheld even though no discriminatory purpose underlay adoption of city's electoral system); see also *id.* at 190 (Stevens, J., concurring) ("the fact that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant"); compare *Fitzpatrick* v. *Bitzer*, *supra* (Congress's extension in 1972 of Title VII's gender discrimination provision to States upheld) with *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.) (Court first expressly rules that Equal Protection Clause imposes heightened scrutiny on gender discrimination claims). In any event, RFRA's legislative history chronicles both historical and contemporary instances of governmental persecution and discrimination against religious adherents and religious minorities.[12]

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[12] See, *e.g.*, H.R. Rep. No. 88, *supra*, at 6; S. Rep. No. 111, *supra*, at 8; *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 5-7, 27, 30-39, 63-64, 69-71, 74, 129 (1992); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 11, 23-25, 104, 107-108, 157-158, 326, 332-338, 398, 406-408 (1992).

c. The City invites this Court (Pet. 23-25) to revisit *Morgan*'s "ratchet theory." The City defines the "ratchet theory" as Congress's power under Section 5 to expand a constitutional right by enacting a statute. But Congress expressly and repeatedly disavowed any intention to change the scope of the First Amendment by enacting RFRA. See, *e.g.*, S. Rep. No. 111, *supra*, at 9, 14 n.43 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action."); H.R. Rep. No. 88, *supra*, at 7, 15 n.3; 139 Cong. Rec. H2358 (daily ed. May 11, 1993) (Rep. Hyde). Rather, Congress made clear that it was simply creating a new statutory right of free exercise in light of this Court's delineation of the First Amendment's scope. S. Rep. No. 111, *supra*, at 14 n.43; H.R. Rep. No. 88, *supra*, at 9, 15 n.3.[13]

d. Finally, the City seeks (Pet. 25-26) a ruling from this Court that Section 5's enforcement provisions apply only to the Equal Protection Clause. This Court, however, has long recognized that Congress's Section 5 power extends beyond enforcement

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[13] If, on the other hand, the City means to argue that Congress may not enact statutory supplements to constitutional rights, then the City is asking this Court to reverse the entire history of Section 5 jurisprudence and to reduce Congress's power under the Fourteenth Amendment "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Morgan*, 384 U.S. at 648-649.

solely of the Equal Protection Clause.[14] In any event, as the court of appeals found (Pet. App. 14a-15a), RFRA enforces the Equal Protection Clause's guarantee of religious equality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 789 (1966) ("We have no doubt of 'the power of Congress to enforce * * * every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'") (quoting *United States* v. *Williams*, 341 U.S. 70, 72 (1951) (opinion of Frankfurter, J.)); see also *Maher* v. *Gagne*, 448 U.S. 122, 130-133 (1980) (upholding congressional power to authorize attorney's fees against States for statutory violations brought in conjunction with due process and equal protection claims); *Hutto* v. *Finney*, 437 U.S. 678, 693-695 (1978) (upholding congressional enforcement of the Eighth Amendment, as incorporated through the Due Process Clause); *Oregon* v. *Mitchell*, 400 U.S. at 285-287 (opinion of Stewart & Blackmun, JJ., & Burger, C.J.) (Section 5 power can enforce due process right to travel between States); *id.* at 236-239 (opinion of Brennan, White, & Marshall, JJ.) (Section 5 power available to enforce ban on residency requirements); *id.* at 147-150 (opinion of Douglas, J.) (ban on residency requirements proper exercise of Section 5 power).